Supreme Court, U.S.
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No. 02-650

IN THE
Supreme Court of the United States

JOHNNY M. EVANS, SR.,

Petitioner,

v.

CITY OF DeRIDDER, LOUISIANA and
DeRIDDER MUNICIPAL FIRE &
POLICE CIVIL SERVICE BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.4(c)

In addition to the parties listed by Petitioner, the State of Louisiana should be considered a party hereto pursuant to 28 U.S.C. § 2403(b) and the Louisiana Attorney General should have been served with the Petition in keeping with Rule 14.1(e)(v) since Petitioner attacks the constitutionality of a Louisiana statute and neither the State of Louisiana nor any agency, officer, or employee thereof is a party.

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STATEMENT OF THE CASE

In the early morning hours of Thursday, August 14, 1997 decedent, Earnest Prater, Jr., was arrested by DeRidder City Police and taken to DeRidder City Hall to be interviewed. Petitioner, Johnny M. Evans, Sr. ("Evans, Sr."), conducted that interview and at Prater's request called Beauregard Parish Deputy Sheriff Betty Pichon, who was a member of the Beauregard/DeRidder Narcotics Task Force. Evans, Sr. then put Prater on the phone with Dep. Pichon, whereupon Prater stated that he knew someone who had about a pound of marijuana and some cocaine and asked if Dep. Pichon could come help him because he was being arrested. Evans, Sr. took the phone and spoke some more with Dep. Pichon, who along with the other members of the aforesaid Task Force, Deputy Sheriff Saul Wilson and DeRidder Police Sergeant John Gott, then went to City Hall to speak with Prater in person. That meeting led to the arrest of an acquaintance of Prater's, Eric Pickens. Prater was not booked, but rather, was released by the DeRidder Police. Prater cooperated with the Task Force to some extent thereafter, including gaining the interest of a friend, Johnny M. Evans, Jr. ("Evans, Jr."), Petitioner's son, in a reverse drug sting, until Prater's murder on August 25, 1997.

On August 28, 1997, Dep. Pichon took Eric Pickens to the DeRidder Police Department and advised Sgt. Gott that Pickens possibly had information concerning a motive in the murder of Prater. Pickens was not a suspect in any crime at that time. However, Pickens then told Sgt. Gott, DeRidder Police Lieutenant Ricky Johnson and Sergeant Kenny Pine that some time the week before while Pickens was at Evans, Sr.'s residence that Evans, Sr. told him Prater was working for the police and that Prater "busted" Pickens and another

person. Then, on August 31, 1997 Pickens gave a statement to Vernon Parish Sheriff's Deputies which stated that Evans, Sr. had told Pickens and Evans, Jr., that Prater had turned Pickens and another person in to the authorities.

After learning of the allegations against Evans, Sr., DeRidder Chief of Police Arvin Malone began the official steps toward an investigation into whether or not Evans, Sr. actually had divulged confidential information to the effect that the decedent, Earnest Prater, Jr., was working undercover to assist law enforcement and that that information led to the arrest of Pickens on August 14, 1997. The investigation ultimately led to the polygraph of Evans, Sr., whereupon the polygraphist rendered a report advising Chief Malone that Evans, Sr. had not told the entire truth as to all of the questions pertinent to the issue of whether he revealed the fact that Prater was the confidential informant whose information led to Pickens' arrest. Upon receipt of the polygraphist's opinion, Chief Malone recommended on October 29, 1997 that Evans, Sr. be dismissed from his employment, effective October 31, 1997, to which Mayor Gerald Johnson agreed and approved the dismissal, effective October 31, 1997.

Evans, Sr. appealed his dismissal to the DeRidder Municipal Fire and Police Civil Service Board ("Board"), which held a hearing regarding that termination on December 18, 1997. The aforementioned facts developed in the investigation were presented to the Board, whereupon the Board found that the alleged violation by Evans, Sr. did occur, that the appointing authority acted in good faith and for cause in the discharge of Evans, Sr. and upheld the dismissal, all by unanimous vote. Both Pickens and Evans, Jr. invoked their right not to testify when questioned before the Board. After the Board hearing and the appeal to the District Court, Eric

Pickens pled guilty to manslaughter and Evans, Jr. was convicted of second degree murder concerning the death of Prater.

On October 9, 2000, the Honorable Stuart S. Kay, Jr., Judge, Thirty-sixth Judicial District Court of the State of Louisiana, in and for the Parish of Beauregard, affirmed the Board's decision for the reasons set forth in his REASONS FOR JUDGMENT AFFIRMING BOARD RULING rendered on August 26, 2000. (App. Vol. I p. A-18) Mr. Evans appealed to the Louisiana Court of Appeal, Third Circuit which rendered Judgment on June 27, 2001 reversing the District Court. (App. Vol I p. A-61) On July 9, 2001, Respondents applied for a rehearing to the Court of Appeal, Third Circuit regarding its said Judgment and moved for the aforesaid remand. The Court of Appeal, Third Circuit denied Respondents' relief by Judgment on Rehearing rendered August 8, 2001. (App. Vol. I p. A-50) An application for writ of review was taken from the action of the Court of Appeal, Third Circuit, which was granted by the Supreme Court of Louisiana on December 14, 2001. (App. Vol. II p. A-125) On April 3, 2002 the Supreme Court of Louisiana reversed the Court of Appeal, Third Circuit and reinstated the District Court's decision upholding the termination of Evans, Sr. (App. Vol. II p. A-167) On April 17, 2002, Evans, Sr. filed his Application for Re-hearing to the Supreme Court of Louisiana. Re-hearing was denied on May 24, 2002.

REASONS FOR DENYING THE PETITION

I.

FAILURE TO COMPLY WITH RULES OF COURT AND TO TIMELY PRESENT QUESTIONS TO BOARD AND COURTS BELOW

Petitioner asserts jurisdiction pursuant to 28 U.S.C. § 1257. The only state statute to which reference is made as being unconstitutional is La. R.S. 33:2561, which concerns the procedure for an appeal by an employee in the classified civil service to the Civil Service Board. He also claims violation of due process both as it concerns that Section 2561 and as it relates to articles of the Louisiana Code of Evidence, especially Article 804 B(3).

Mr. Evans' claim of unconstitutionality of the said Section 2561 appears to invoke the application of 28 U.S.C. § 2403(b). It does not appear that Petitioner has complied with the Court's Rule 14.1(e)(v) by reciting in his Petition that 28 U.S.C. § 2403(b) may apply, nor has Petitioner served his Petition on the Louisiana Attorney General.

It is unclear, if, much less where or when, Petitioner raised any alleged federal questions before the DeRidder Municipal Fire and Police Civil Service Board, the Thirty-sixth Judicial District Court of the State of Louisiana, the Louisiana Court of Appeal, Third Circuit or the State of Louisiana Supreme Court as is required by Rule 14.1(g)(i) of this Honorable Court. Since Petitioner's alleged federal claims discussed in the arguments on at least his second through fifth questions apparently were not presented to the Board or Courts until his Application for Rehearing to the

Louisiana Supreme Court. Therefore, those questions were not timely presented in light of *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001); *Campbell v. Louisiana*, 523 U.S. 392,118 S.Ct. 1419, 140 L.Ed.2d 551 (1998); and *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997), and this Honorable Court should not grant review. Nevertheless, assuming *arguendo* that the Court entertains the application, Respondents will address the alleged federal questions.

II.

POLYGRAPH RESULTS WERE PROPERLY ADMITTED INTO EVIDENCE IN THE HEARING OF THE CIVIL SERVICE BOARD

Contrary to Petitioner's allegations, the Louisiana Supreme Court's decision supports the case-by-case determination of admissibility of expert testimony provided by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 79, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as well as by *Kumho v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The decision of Louisiana's Court of Appeal, Third Circuit essentially established a *per se* exclusionary stance concerning polygraph tests which certainly was contrary to those decisions of this Court, as well as that dealing with polygraphs in *United States v. Pasado*, 57 F.3d 428 (5th Cir. 1995). *Pasado* discarded the Fifth Circuit's prior position of inadmissibility of polygraph evidence.

The Louisiana Supreme Court reviewed the expertise of the polygraphist which was developed in the Civil Service Board hearing and found no irregularities in the methodology, testing, procedures or accuracy acknowledged by the Board.

The District Court's approval of the Board's treatment of that expert testimony in light of Louisiana's Code of Evidence Articles 702-703, which were taken from their federal counterparts, Articles 702-705, F.R.E., was also approved by Louisiana's Supreme Court below.

The Louisiana Supreme Court pointed out that deference is given to such a Board's conclusions. (App. Vol. II, A-173) The Court noted the Board's duty to decide independently from the facts presented whether the Mayor had good and lawful cause to terminate Mr. Evans. It also reiterated the principle that a reviewing court must affirm the Board's decision unless it was clearly wrong or manifestly erroneous. (App. Vol. II, A-173) Such boards can admit evidence which would not be admissible under the Louisiana Code of Evidence. (App. Vol. II, A-174) Rule 10.4 of the Rules of Civil Service Commission, which was followed by the Board below, was cited by the Court as providing that " '[t]he rules of evidence as applied in civil trials before the courts of this state need not be strictly complied with but the board shall limit evidence to matters having a reasonable relevance to the issues before the board.' " (App. Vol. II, A-174-175) The Court also found that such evidence must be competent. (App. Vol. II, A-175)

As demonstrated in the City's Exhibit 3 in the Board Hearing, Mr. Evans was notified by DeRidder City Police Chief Malone of the complaint lodged against him and that an investigation was being initiated. That exhibit also shows that he was represented by counsel at least forty-four (44) of the fifty-nine (59) days between notification and termination. It also reveals that his counsel wrote the Chief no fewer than nine (9) times concerning Mr. Evans' rights and the investigation, including the Chief's offer to allow Mr. Evans

to select the polygraph examiner to conduct the polygraph. That same attorney represented Mr. Evans before the Board where he vigorously cross-examined the polygraphist concerning his training, experience, expertise, machine, methodology and results. The Board, which had an independent legal counsel who actively participated, admitted the polygraph results and found Mr. Evans' termination to be in good faith and for cause.

The District Court rejected Petitioner's citations and argument regarding the use of polygraph here. That Court pointed out that in each of the cases cited by Mr. Evans the Courts exercised discretion by excluding polygraph examinations due to irregularities peculiar to each such case. The District Court pointed out that no such irregularities appeared in this case, but rather, "the conditions appeared to be optimum as required by *Catanese*." (App. Vol. I, A-25) That Court went on to favorably compare the proceedings before, and decision by, the Board to the principle set forth in *Rowe v. State Farm Mut. Auto. Ins. Co.*, 95-669 (La. App. 3 Cir. 3/6/96), 670 So.2d 718, 728:

> 'As a general rule, the factual basis of an expert's opinion goes to the credibility of the testimony, not its admissibility, and it is up to the opposing party to examine the factual basis of the opinion in cross-examination. *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988).'

(App. Vol. I, A-26). Clearly, the District Court relied upon Louisiana Code of Evidence Articles 701 through 704 regarding expert testimony in affirming the acceptance of polygraph evidence by the Board and its reliance upon same in upholding Mr. Evans' termination. Contrary to Petitioner's

assertion, Louisiana Code of Evidence 104(a) and its counterpart, Federal Rule of Evidence Article 104(a), do not dictate otherwise.

The Louisiana Supreme Court rejected Petitioner's position that the polygraph results were inadmissible, noting that " 'Louisiana courts have long recognized that a civil service employee may be ordered to take a polygraph and that the employee can be suspended or discharged for failing to take a polygraph.' " (App. Vol. II, A-175-176) Further the Court acknowledged several reasons to treat evidentiary matters before boards differently than before criminal courts. (App. Vol. II, A-178) Similarly, it reiterated that a police officer is burdened with a special position of being " 'a symbol of public trust and law enforcement who must remain above all suspicion which might tend to lessen this image and that of the entire police department' ", thereby demanding " 'an immediate corroboration of his statement denying any wrongdoing. . . .' " (Citation omitted) (App. Vol. II, A-179) In addition, the Court noted that legislation had been enacted in Louisiana regulating polygraph examiners following a previous ruling by it in a criminal case rejecting admission of polygraph results, thereby evidencing current approval of polygraph examinations in Louisiana. Further, the Court found that the Board was justified in admitting the polygraph evidence since it met the test for "competency" in that it had " 'some degree of reliability and trustworthiness and is of the type that reasonable persons would rely upon.' " (App. Vol. II, A-180)

Petitioner cited *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) for the first time in his Application for Rehearing to the Louisiana Supreme Court. He cites it here, also. This Court in *Greene* found it prejudicial

not to make reports available to the Petitioner. No such deprivation existed here, rather, Petitioner was furnished with the materials of which he complains, including polygraph results and statements of Eric Pickens to law enforcement. Counsel for Mr. Evans had the right to subpoena witnesses, including law enforcement officers to whom Pickens spoke, and to subpoena documents, and he did both. He had the right to thoroughly cross-examine witnesses, including the polygraphist, and he engaged in such extensive cross-examination.

Petitioner's reliance upon *U.S. v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) is also misplaced. *Scheffer* dealt with an appeal by an airman who was convicted by a general court-marshal and complained that his defense was thwarted by Military Rule of Evidence 707 which declares polygraph evidence inadmissible in court-marshals. As this Honorable Court noted, that Rule was the result of a declaration by the President. Obviously, no such rule exists in Louisiana. The Louisiana Supreme Court's decision below to leave the determination of admissibility of polygraph evidence to the Board, subject to judicial review as was done here, is the sounder rule.

III.

THE PLEA OF UNCONSTITUTIONALITY WAS NOT TIMELY RAISED

Mr. Evans ascribes unconstitutionality at least to Louisiana Revised Statutes Title 33, Section 2561. Since Mr. Evans did not contest the unconstitutionality by specially pleading such a claim and particularizing the grounds for that claim until now, he cannot be heard to contest it before

this Honorable Court. See *Adarand Constructors, Inc. v. Mineta, supra*, and *Adams v. Robertson, supra*. As stated in *Istre v. Meche*, 2000-1316 (La. 10/17/00), 770 So.2d 776, 779, relying upon *Williams v. State Dept. of Health & Hospitals*, 95-0713 (La. 1/26/96), 671 So.2d 899 and *Vallo v. Gayle Oil Co., Inc.*, 94-1238 (La. 11/30/94), 646 So.2d 859:

> 'First of all, the plea of unconstitutionality must first be made in the trial court. Next, the plea of unconstitutionality must be specially pleaded. Finally, the grounds outlining the basis of unconstitutionality must be particularized.' *Williams*, 95-0713 at pp. 4-5, 671 So.2d at 902 (internal citations omitted). These procedural rules exist to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute. *Vallo*, 94-1238 at p. 9, 646 So.2d at 865. This opportunity to fully brief and argue the issue provides the trial court with thoughtful and complete arguments relative to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to adjudge the constitutionality of the statute.

The Louisiana Supreme Court will not consider such claims when they have not been pleaded before and addressed by the District Court. *See Boudreaux v. State*, 2001-1329 (La. 2/26/02) 815 So.2d 7.

IV.

PETITIONER'S DUE PROCESS CLAIMS ARE UNFOUNDED

Assuming *arguendo* that the Court entertains Mr. Evans' argument on questions I and II, however, his reliance upon the Due Process clauses of the Constitution is not well founded. Under Louisiana law statutes are presumed to be constitutional and any doubt in that regard is resolved in favor of constitutionality. *See State v. Weaver*, 2001-0467 (La. 1/15/02), 805 So.2d 166, 170. An attack upon a statute such as La. R.S. 33:2561, which concerns termination of a classified civil servant such as Mr. Evans, requires Mr. Evans to carry the heavy burden of proving violation of substantive due process and/or procedural due process. He did not timely make that argument in the Louisiana courts and his argument here fails to carry that burden.

Fields v. State, 98-0611 (La. 7/8/98), 714 So.2d 1244, 1250 discusses the two distinct protections afforded by the due process clauses of the Louisiana and federal constitutions, namely, substantive due process and procedural due process. The Court there went on to point out, "a court looks only at whether a particular legislative measure was a rational way to correct a problem" and that "the test of substantive due process is whether the regulation is rational in relation to the goal sought to be obtained and is adopted in the interest of the community as a whole." (Citations omitted) *Id.* at 1250. Certainly Louisiana's statutory law establishing the grounds for discipline of a classified city civil servant for commission of an act prejudicial to the departmental service or contrary to the public interest under La. R.S. 33:2560 A.3. is a regulation which is rational in relation to the goal of

maintaining standards of service through disciplinary action which was adopted in the interest of Louisiana's cities and their citizens. So is La. R.S. 33:2561. The notification of Mr. Evans of the investigation, the exchange between Mr. Evans and/or his attorney and Police Chief Malone for almost two (2) months concerning the investigation and polygraph, the notice of discharge and right to a hearing to which Mr. Evans availed himself and the ultimate appeal of the decision of the Board all evidence that Mr. Evans was not arbitrarily deprived of his position of trust as a DeRidder City Police Officer, so substantive due process has not been denied him. *See Babineaux v. Judiciary Commission*, 341 So.2d 396 (La. 1976).

Mr. Evans also complains that he was denied due process by not being afforded a hearing before a qualified attorney-Judge or a trial de novo subsequent to the administrative hearing. However, as the Louisiana Supreme Court stated in *Lott v. Department of Public Safety*, 98-1920 (La. 5/18/99), 734 So.2d 617 at p. 621:

> In *Wall v. Close*, 201 La. 986, 10 So.2d 779, 784 (1942), this Court previously noted that '[n]o one has a vested right in any given mode of procedure.' Our state may determine the process by which legal rights are asserted and enforced so long as a party receives due notice and an opportunity to be heard. *Id.*

Exhibit City 3 evidences that Mr. Evans was made well aware of a complaint having been lodged against him in an investigation concerning his allegedly telling his son, Johnny M. Evans, Jr., and Eric L. Pickens, a good friend of his son, that Earnest Prater, Jr. was a confidential informant and that

his information led to Pickens' arrest. The documents constituting that Exhibit City 3 make it clear that the alleged offense was a serious one which could lead to termination from Mr. Evans' employment. That fact was obviously well understood as can be seen from the letters of Mr. Evans' attorney who represented him vigorously and well by continuously maneuvering tactically to defend and benefit Patrolman Evans. Those defense tactics included hints of civil action against the City concerning the administration of a polygraph test. They also included delaying tactics concerning such a polygraph test. As mentioned hereinabove, Mr. Evans nevertheless submitted to a polygraph test. When Chief Malone considered the polygraph test results, as well as the investigation he instigated, which included two (2) statements of Eric L. Pickens, Mr. Evans' son's friend, which incriminated Mr. Pickens with information to the effect that Patrolman Evans had disclosed to Mr. Pickens and Johnny M. Evans, Jr. that Earnest Prater was a confidential informant, Chief Malone recommended dismissal of Mr. Evans. Mayor Johnson concurred and dismissed Mr. Evans, whereupon Mr. Evans availed himself of the administrative hearing process afforded by the aforesaid statutes, which involved his calling of witnesses, testifying himself and cross-examining the City's witnesses, all of which resulted in the Board's affirming the Mayor's action, whereupon Mr. Evans availed himself of the judicial review process afforded him by those laws. It is worthy to note that the Board retained an independent attorney advisor to assist it in matters such as determination of admissibility of evidence. The record of that hearing clearly reflects that the Board in fact relied upon the advice of that attorney.

Mr. Evans' reliance upon *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976) is misplaced. *North*

dealt with due process in the context of a judicial tribunal, albeit a police court in which by statute the Judge did not have to be an attorney. In the matter *sub judice*, an administrative proceeding was involved. In *Lott*, *supra*, the Louisiana Supreme Court cited *Hamilton v. Louisiana Health & Human Resources Admin.*, 341 So.2d 1190, 1193 (La. App. 1st Cir. 1976), *writ refused*, 344 So.2d 4 (La. 1977) with approval as follows:

> In *Hamilton*, the appellant argued that an appeal hearing should be held before the State Civil Service Commission, or at least one member of that commission, who could see and hear witnesses and assess their credibility. Absent such presence on the part of the commission, the appellant urged that the appointment of a referee to hold a hearing and take evidence was a denial of due process. The court, observing that procedural due process as applied in the field of administrative law is more flexible than its application in a judicial tribunal, held that the opportunity of the State Civil Service Commission to hear witnesses was not an 'indispensable prerequisite' to due process in administrative hearings so long as the party involved is afforded ample opportunity to confront and cross examine witnesses and to present his own case in full. *Hamilton*, 341 So.2d at 1193-94 (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). Furthermore, as Article 10, Section 12 of our state constitution is the source of the State Civil Service Commission's authority to appoint a referee to take testimony, the court concluded that to require a regular trial in such circumstances would result in a negation of that constitutional provision. *Id.* at 1194.

V.

INCRIMINATING STATEMENTS TO LAW ENFORCEMENT OFFICERS BY ERIC PICKENS CONSTITUTE COMPETENT EVIDENCE AND HEARSAY EXCEPTIONS

Petitioner claims that two (2) statements to law enforcement officers by Eric Pickens, who claimed his right not to testify before the Board and later pleaded guilty to manslaughter in the death of Prater, incriminating himself and that Mr. Evans told him and the other convicted killer that Prater furnished information to law enforcement which led to Pickens' drug arrest, were erroneously admitted by the Board. Petitioner cites *Williamson v. U.S.*, 512 U.S. 594, 114 S.Ct., 2431, 129 L.Ed.2d 476 (1994), a criminal case, in support of his position. There, this Honorable Court remanded for determination of whether statements were truly self-inculpatory. The Louisiana Supreme Court determined here that Pickens' statements were self-inculpatory and also inculpated Mr. Evans, just as the District Court did in affirming the Board's admitting those statements. The Louisiana Supreme Court also found the statements were properly considered by the Board pursuant to Louisiana Code of Evidence Art. 804 B(3). It pointed out that the statements constitute competent evidence pursuant to *Chaisson v. Cajun Bag & Supply Co.*, 97-1255 (La. 3/4/98), 708 So.2d 375 and were thus admissible in an administrative hearing. (App. Vol. II, A-186)

Petitioner also claims his right to cross-examine has been denied by admission of Pickens' statements. Again, Pickens invoked his right not to testify before the Board. However, Mr. Evans testified and denied that he told Pickens or his

son any such incriminating information. Counsel for Mr. Evans could have called as witnesses the two (2) different law enforcement agencies' officers to whom Pickens made the statements but apparently chose not to. As *Lilley v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) provides, the Confrontation Clauses of the Sixth and Fourteenth Amendments apply to criminal defendants. The Louisiana Supreme Court in *Chaisson, supra*, acknowledged the inability of counsel to cross-examine as to such statements in an administrative hearing and allowed the use of same. In a similar matter that Court in *State v. Marston*, 2000-0589 (La. 3/16/01), 780 So.2d 1058, rejected an analogous objection as to business records and stated at p. 1064:

> We therefore find no particularized basis in the present case for departing from the general rule that a defendant's right to confront his accusers is satisfied if hearsay evidence 'has sufficient guarantees of trustworthiness to come within a firmly rooted exception to the hearsay rule.' *White v. Illinois*, 502 U.S. 346, 358, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992); *see 2 McCormick on Evidence*, § 252 p. 125 ('[H]earsay falling within a traditional or "firmly rooted" exception to the rule will be admissible under the Confrontation Clause. Where the exception does not require unavailability because of the theoretical superiority of the out-of-court statement, the Constitution does not require it.' (footnote omitted).

The Court also relied upon *White v. Illinois*, *supra*, in *State v. Robinson*, 2000-2284 (La. 1/12/01), 776 So.2d 431 in discussing admissibility of excited utterances at p. 432:

> Assuming that the state meets the foundational requirements for this firmly rooted hearsay exception, *see State v. Henderson*, 362 So.2d 1358, 1361 (La. 1978), the introduction of a victim's excited utterance does not violate the Confrontation Clause even when it constitutes the only direct evidence that the defendant committed the offense.

Louisiana's Court of Appeal, Fourth Circuit in *State v. Keys*, 99-0418 (La. App. 4 Cir. 11/8/00), 772 So.2d 918, 923 permitted the use of such statements since the opponent of those statements was permitted to fully cross-examine the witnesses to the out-of-court statements at issue. The Fourth Circuit cited its opinion in *State v. Henderson*, 95-0267 (La. App. 4 Cir. 4/3/96), 672 So.2d 1085, *writ denied*, 96-1160 (La. 10/11/96), 680 So.2d 648 for that same proposition. *Henderson*, *supra*, at 1090, noted that *Park v. Huff*, 506 F.2d 849, 860 (5th Cir. 1975), *cert. denied*, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975) allowed such statements when the opponent was afforded the opportunity to cross-examine the witnesses thereto. *Henderson*, *supra*, also found that proposition to be in accord with *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

Here the Board obviously determined the statements of Pickens to be consistent. The Louisiana Supreme Court decided that the Board was entitled to make the determinations as to consistency and the weight to be given those statements and refused to reverse as being manifestly erroneous. That decision should be upheld.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari to review the judgment of the State of Louisiana Supreme Court be denied.

Respectfully submitted,

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